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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1961

No. [redacted] 154

RALPH RICHARDSON, - - - - - Petitioner,

versus

C. C. BRUNNER, alone Case 1, - - Respondent.

C. C. BRUNNER,
CITY OF LOUISVILLE, KENTUCKY,
VERNON H. WETHERBY, Tax Receiver,
WM. B. MEYER, Director of Finance,
HON. JOHN B. BRECKINRIDGE, Attorney General. } Case 2, - Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

PETITIONER'S PETITION FOR REHEARING
Rules 25(2), 58(2).

PLEASE PATIENTLY READ CERTIFICATE OF GOOD FAITH, ETC.
Rule 58(2).

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1961

No. 1009

RALPH RICHARDSON, - - - - - - - *Petitioner,*

v.

C. C. BRUNNER, alone Case 1. - - - - *Respondent.*

C. C. BRUNNER,
CITY OF LOUISVILLE, KENTUCKY,
VERNON H. WETHERBY, Tax Receiver,
WM. B. MEYER, Director of Finance,
HON. JOHN B. BRECKINRIDGE, Attorney General. } Case 2. - *Respondents.*

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CERTIFICATE OF GOOD FAITH, ETC.
Rule 58(2).

May it please the Court:

I.

CASE 1 DEFAULT JUDGMENT OF OCTOBER 22, 1956 ABSOLUTELY VOID — TAKES PETITIONER'S PROPERTY WITHOUT DUE PROCESS OF LAW IN PLAIN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

A very real keen sense of right, justice and equity constrained me (Robert Hubbard) to file this petition for a rehearing. I sincerely, humbly and earnestly plead with this Honorable Court to reconsider their order denying the petition for a Writ of Certiorari, and I want to especially point out in Case 1, that the default judgment of October 22, 1956 is absolutely void and, therefore, takes petitioner's property without due process of law contrary to and in violation of the Fourteenth Amendment of the Constitution of the United States.

To this end, I boldly assert that:

1. Three elements or conditions must exist to clothe a court with jurisdiction to render a valid judgment. They are: (1) jurisdiction of the person; (2) jurisdiction of the subject matter; (3) a complaint that states a cause of action. If any one of them is lacking, any judgment rendered on such complaint is absolutely void and may be set aside at any time.

2. Where a claim is based upon a statute, the complaint must definitely and specifically set forth all the

provisions of said statute or else it is fatally defective, and any judgment rendered thereon is absolutely void.

3. The trial court had no jurisdiction in Case 1 at the bar to render said default or any judgment, because respondent's complaint did not set forth the provisions of KRS 91.540 upon which it was based and therefore did not state a cause of action.

4. Respondent's claim, if any he has, to the property in Case 1 is based upon the provisions of KRS 91.540 (see Appendix to Petition, page 77) which is as follows

> "91.540 (3004). DEED TO PURCHASER AT TAX SALE: EFFECT AS EVIDENCE.
>
> "If real property is not redeemed within the time allowed for redemption, a fee simple title shall vest absolutely in the purchaser, subject only to state taxes, and the tax receiver shall thereupon convey the property by deed to the purchaser. The purchaser shall then be entitled to possession of the property, and may recover it by action or motion. Any purchaser other than the city shall pay all city tax bills on assessments made against the property after the assessment of the tax for which it was sold, with interest as provided by KRS 91.430, and the tax receiver shall not convey the property to the purchaser until all such tax bills have been paid. The deed shall be prima facie evidence of the regularity of the sale, of all prior proceedings, and of title in the purchaser to whom the deed is executed."

Respondent's complaint (see Tr. of Record, Case 1, pp. 10-12), omitting the description of the property, in Case 1, is as follows:

"Comes the plaintiff, C. C. Brunner, and states that he is the record title owner of the hereinafter described property in Louisville, Kentucky:

(Description omitted)

"Plaintiff states that Ralph Richardson is made a party hereto to assert any claim or interest in the above-described property that he may have by reason of a deed to him dated August 12, 1946 and recorded in Deed Book 2154, page 570 in the office of the clerk of the Jefferson County Court, Jefferson County, Kentucky.

"Plaintiff says that his rights are affected, and that an actual controversy exists with respect to his rights, under KRS 91.540; that the plaintiff contends that he is the fee-simple owner of the heretobefore described property and that he is entitled to the immediate possession of the said property, and that he is entitled to a declaration of his rights by this Court.

"Plaintiff states that there is a mortgage against the said property payable to M. and Fannie Kaufman recorded in Deed Book 2154 page 570 in the office of the clerk of the Jefferson County Court, Jefferson County, Kentucky; that they are made parties to this action to assert any claim that they may have against the said property.

"Plaintiff says that the defendants M. Kaufman and Fannie Kaufman are non-residents of this state and that they are absent therefrom; that they are now residents at 212 Main Street, Little Rock, Arkansas, which is the place wherein a post office is maintained nearest to the residence of these defendants.

"WHEREFORE, plaintiff, C. C. Brunner, prays this Court for a declaratory judgment directing the defendant, Ralph Richardson, to release any and all rights or claim that he makes against the property herein; that this plaintiff be declared to be the owner of the fee-simple title thereto; and for warning order attorney be appointed for the defendants Fannie Kaufman and M. Kaufman to notify them of the pendency of this action; and for all other relief to which he may appear entitled.

"(s) JOSIAH B. GATHRIGHT
for
BELL & GATHRIGHT
Counsel for Plaintiff
608-9 Realty Bldg.,
CLay 4894

"Plaintiff, C. C. Brunner, says that the statements contained in the above complaint are true as he verily believes.

"(s) C. C. BRUNNER
C. C. Brunner

"Subscribed and sworn to before me by C. C. Brunner, this the 20th day of April, 1956. My commission expires 6/7/57.

"(s) C. L. BELL
Notary Public, Jefferson Co., Ky."

On this point we most respectfully request this Honorable Court to reread paragraph E (1, 2, 3, and 4, pages 31-34 of Petitioner's Petition). Firmly believing that this Honorable Court has grievously erred in denying his petition, we most respectfully request the Court to reread the entire petition.

KRS 91.540 above quoted reads, in part, as follows:

> "If real property is not redeemed within the time allowed for redemption, * * * any purchaser other than the City shall pay all city tax bills on assessments made against the property after the assessment of the tax for which it was sold, with interest as provided by KRS 91.430, and the Tax Receiver SHALL NOT CONVEY THE PROPERTY TO THE PURCHASER UNTIL ALL SUCH TAX BILLS HAVE BEEN PAID." * * *.

Repeating, we most respectfully call the Court's attention to the fact that Respondent's complaint omits the above two vital conditions of KRS 91.540. Hence, it is fatally defective, it does not state a cause of action. The default judgment of October 22, 1956 rendered upon it is, therefore, void, and takes this petitioner's property without due process of law.

II.

KRS 91.540 VIOLATES THE FUNDAMENTAL PRINCIPLE OF SEPARATION OF POWERS OR GOVERNMENTAL FUNCTIONS GUARANTEED BY BOTH THE FEDERAL AND KENTUCKY CONSTITUTIONS.

From the earliest pages of recorded history legislative, executive and judicial functions—powers—of civil government have been generally reposed in one person—a king, an emperor, a dictator, or in some small body of men. The framers of the United States Constitution (they were learned in the science of civil government, they were able and patriotic men) knew, realized, and were aware of the very, very grave danger of reposing in one man or one body of men all powers or functions—legislative, executive and judicial —of civil government. The framers of the Federal Constitution were well aware that all too often men were deprived—many times by force and violence—of their inalienable rights (among which was and is the right to the ownership and protection of private property, even against tyrannical and oppressive collection of taxes) by oppressive orders, decrees or laws promulgated or enacted by one man or one small set of men. Hence, they separated the powers of the government in our Federal Constitution. The separation of said powers is very distinct and definite. The framers of Kentucky's constitution were also learned, able and patriotic men. They likewise separated in the Kentucky constitution the legislative, executive, and judi-

cal departments. See Section 27 of Kentucky Constitution, Appendix, page 69. The very letter and spirit of both the Federal and Kentucky constitutions prohibit the combining of any two, legislative, judicial or executive functions of government in one person or group of persons. Hence, any statute or law, state or Federal, which does so combine two or more of said departments or functions of civil government in one person or group of persons, is in plain violation of both the letter and the spirit of the Federal and Kentucky Constitutions.

In Brunner v. Bell (Ky.), 290 S. W. 2d 461, upon which the Court of Appeals of Kentucky quotes to sustain their opinion, they said:

> "WE HAVE HELD CONSISTENTLY THAT PROCEEDINGS TO SELL PROPERTY FOR TAXES MUST CONFORM TO STATUTORY PROVISIONS, AND PROCEEDINGS WHICH FAIL TO DO SO ARE VOID."

Now KRS 91.470 and KRS 91.480 (see Appendix IV, pp. 74-75 of Petitioner's Petition) name the statutory conditions and provisions by which the City Tax Receiver (a ministerial or executive officer) is governed in the sale of real property for taxes. It is a question of fact, for judicial determination, as to whether or not the tax receiver in the sale of real estate for taxes does or did, in the cases at bar, comply, in the sale of real estate involved, with the provisions of KRS 91.470 and 91.480. He did not. He neither attempted to (1) distress any personal property, or

(2) to hold an auction, and sold more property than was necessary to pay the city tax bills in Case 1.

Mr. Wetherby, the City Tax Receiver, was honest. He candidly admitted (1) that he never distrained personal property; (2) that he never held an auction.

"Q. Mr. Wetherby, since you became the City Tax Receiver for the City of Louisville in 1952, up to the present, have you ever levied upon or distrained personal property of any delinquent taxpayer before you sold the real estate for delinquent taxes?

Mr. Bell: Again enter my objection because he had not alleged in his pleadings any allegations in reference to levying on personal property.

Mr. Hubbard: You decline to answer that?

The Witness: I might answer it, No.

Q. You never have?

A. No. * * *

Q. I'm talking about since you have been Tax Receiver, you have never distrained on any personal property for any delinquent tax bill?

A. That's right. * * * (Tr. 1, Case 2, pp. 38-39).

Q. Mr. Wetherby, in sales of delinquent tax bills on real estate, you just sit around a table and ask this man and that man if he wants this piece of property or that piece of property, is that right?

A. Yes, sir, that is the way the sale is conducted.

Q. In other words, Mr. Wetherby, you don't auction and say, 'who will bid on this tax bill, so much,' or anything like that?

A. No, sir, I do not.

Q. Let's go over and ask—

A. We only—we only sell for the amount of the taxes due the City. There is no bidding on it.

Q. You just—if you mean that circle around you, ask him if they want this or that?

A. There is probably eight or ten of them there.

Q. I say a few men—

A. Yes, sir, a few.

Q. You just ask which one wants this—

A. That's right."

(See Tr. of Record, Case 2, pp. 37-38.)

Certainly KRS 91.540 leaves the question to the tax receiver, an executive officer, a judicial question of fact, as to whether or not he has, in the sale of the property for taxes, complied with the statutory provisions, and, hence, said section of the statute combines judicial and executive functions in one man in plain violation of both the spirit and the letter of the separation of governmental functions or powers in both the Federal Constitution and the Constitution of Kentucky and is, therefore, unconstitutional.

III.

DUE PROCESS OF LAW DEMANDS NOTICE AND HEARING BEFORE, *NOT AFTER*, PRIVATE PROPERTY IS TAKEN, EVEN FOR THE COLLECTION OF TAXES.

We keenly feel that duty requires us to again emphasize this very, very fundamental principle before this Honorable Court.

In all due respect to the Court of Appeals of Kentucky, we most respectfully, yet emphatically, assert and maintain that said court grievously erred in holding in Case 2 at the bar (see Appendix III, pp. 63-66 of the Petition) that KRS 91.540 was and is constitutional because they (the Court of Appeals of Kentucky) had held in Brunner v. Bell, *supra,* and other cases that, if, in the sale of real property for taxes, the statutory provisions were not complied with, the tax deed was void ab initio, and the taxpayer might recover his property after it had been taken. Such serious, grave and erroneous reasoning is like locking the barn door after the horse has escaped. It is like calling black white, or wrong right, or evil good. To hold that the taxpayer may possibly after his property has been taken, recover it, is to emaciate and destroy due process of law both under the Federal and Kentucky constitutions. We have read many opinions from both state and federal courts and this is the first time (though we may have overlooked some) that we have found a case that holds that a statute is constitutional because after

the taxpayer's property has been taken he may possibly recover it. We have not found any legal text writers that so hold, either.

The fallacy of such reasoning is two-fold, first, as we have repeatedly pointed out and emphasized, it ignores and evades the very plain meaning of due-process of law, that a person shall have an opportunity to be heard before, NOT AFTER, his property is taken, and, second, practically speaking it is almost impossible for him to recover his property under rule of Brunner v. Bell, *supra.*

Case 1 at the Bar, Appendix I, II, III, pp. 55-63, Most Aptly and Vividly Demonstrates This.

In Case 1 just mentioned Petitioner, on November 23, 1956, made a timely motion to set aside the default judgment supported by his affidavit (see T. of Record, Case 1, pp. 15-21) which, under the authority of Brunner v. Bell, *supra,* set up a perfect defense In disposing of this Motion the Court of Appeals of Kentucky in Richardson v. Brunner, 327 S. W. 2d (Ky.) 572, said:

> "For the purpose of this discussion we shall assume that the Defendant, Richardson, had a valid defense, while highly questionable, we shall likewise assume that he properly defined this defense in his motion."

He presented not merely a valid, but a perfect defense. The Court, however, continued by saying that:

"This does not of itself entitle the defendant to the relief sought. He must explain why he did not present that defense upon the trial and thus excuse his default." (See Appendix I, p. 57.)

Petitioner did explain why he did not present said defense. Among other things the petitioner, in his affidavit of November 23, 1956, in support of his motion to set aside the default judgment of October 22, 1956, said:

"6. The said Simons told affiant, at the time of this conversation, to contact Messrs. Bell and Gathright, in the Realty Building, who were attorneys for C. C. Brunner, about making arrangements to pay these taxes. Affiant states that thereafter he went to the offices of Bell and Gathright, in the Realty Building, and talked to either Bell or Gathright, and affiant believes that he talked to Gathright, although he cannot be certain.

* * * * * * * *

"8. Affiant states that during this conversation he asked this attorney if he could not pay ONE THOUSAND DOLLARS ($1,000.00), which sum he had previously been informed by other sources was due and owing. The attorney refused to accept said sum and said that he would have to pay the sum of SEVEN THOUSAND DOLLARS ($7,000.00) immediately in order to get the property released back to affiant.

"9. Affiant states that after this conversation he visited Mr. Charles Strull of 318 Armory Place to see if Mr. Strull would lend him some money to pay these taxes. The said Strull advised him

to go back to Bell and Gathright, the said attorneys, to see if they would not accept a lesser sum after being assured by Mr. Strull that he would lend to affiant as much as FOUR THOUSAND to FIVE THOUSAND DOLLARS ($4,000.00 to $5,000.00) toward the payment of this indebtedness.

"10. Affiant states that he returned to the offices of Bell and Gathright in the Realty Building to see if they would accept a lesser sum, but they refused. Also, Bell and Gathright refused to take any of the SEVEN THOUSAND DOLLARS ($7,000.00) in installment payments.

* * * * * * *

"15. Affiant states that after the above stated conversations, he had with Bell and/or Gathright as to the amount of taxes due, he had given up all hope of being able to save said property because of the sum in excess of SEVEN THOUSAND DOLLARS ($7,000.00) that was demanded of him.

"16. Affiant further states that he had no money with which to hire an attorney.

"17. Affiant states that because of his ignorance of the true facts of this case, his rights, and his illiteracy, he did not defend this action" (Tr. Record, Case 1, pp. 18-20).

* * * * * * *

Mr. Gathright, on November 29, 1956, filed his counter affidavit as follows:

"Affiant, Josiah B. Gathright, says that he is an associate of C. L. Bell and that they are counsel for C. C. Brunner in the above styled action.

"Affiant states that he had two conversations with the defendant in the above styled action in the summer of 1955 in regard to the repurchase of the property in this action from the plaintiff, C. C. Brunner. There were no misrepresentations made to the said Ralph Richardson, he was merely told what Mr. Brunner would take to reconvey the property to the said Richardson.

"The affiant states that the attorney now representing Ralph Richardson is also attorney of record for Otto and David Rouck who have conflicting interest with the defendant Ralph Richardson.

"The affiant says that the said Ralph Richardson did have counsel representing him at the time of the discussions with this affiant. This affiant says that he discussed this matter with Carl Helman who had counseled the defendant Ralph Richardson also with Thomas J. Knight who represented the defendant Ralph Richardson as shown by the photostat of a letter from Mr. Knight attached hereto and made a part of this affidavit" (Tr. Record Case 1, p. 22).

The letter of Judge Knight, Tr. of R. Case 1, p. 97, which Mr. Gathright referred to, was written on January 30, 1956 to petitioner's rental agent, Arnold Simons. Judge Knight, in his affidavit, said that in reality he did not represent petitioner, but did represent a Mr. Strull who was contemplating lending money to petitioner to pay Mr. Brunner. In Judge Knight's letter, he complained to Mr. Simons, Richardson's rental agent, that he, Simons, was withholding Richardson's rents at the request of the respondent or his

counsel. So, four months before Brunner's suit was filed in 1956, he and his counsel had a strangle hold on Richardson's rentals.

AT THIS TIME RESPONDENT, MR. BRUNNER, HAD PAID LESS THAN ONE THOUSAND DOLLARS ($1,000.00) IN TAXES, AND MR. STRULL WAS WILLING TO LOAN PETITIONER FOUR OR FIVE THOUSAND DOLLARS. See Strull's Affidavit, pp. 23, 24, Tr. of R., Case 1. Mr. Helman, in his affidavit, says that he never represented the petitioner. Tr. of R., Case 1, pp. 24-25. Judge Knight, in his affidavit, states that he did not represent the petitioner and concludes his affidavit in these words

> "5. In affiant's opinion, the defendant, Richardson, is an illiterate, uneducated, hard-headed Negro, who is not fully cognizant of all of his rights, * * *."

Mr. Brunner, Respondent in this case, is the same identical person as Mr. Brunner in Brunner v. Bell, *supra*. His counsel, Messrs. Gathright and Bell, in that case, are his counsel in the case at bar. They knew that, if the city tax receiver failed (1) to distrain personal property; (2) failed to auction the tax bill; or (3) sold more real estate than was necessary to pay the tax bills, the deed to Mr. Brunner in the case at bar was void *ab initio*. In Case 2 (see pp. 9-10 above), the same tax receiver, Mr. Wetherby, who sold the property involved in these consolidated actions, before the court, admitted that he (1) never distrained

any personal property; (2) that he never had an auction. In Case 1 the trial court (see Tr. of R., Case 1, pp. 29-32) erroneously refused to permit your petitioner to take Mr. Wetherby's deposition to show these facts, and the Court of Appeals of Kentucky erroneously failed to pass upon the trial court's ruling. Counsel, Mr. Gathright, knew that Mr. Brunner's deed was void if the tax receiver, in the sale to Mr. Brunner, failed to comply with statutory provisions.

Query, was Mr. Gathright under any duty, moral or legal, when he talked to petitioner, to disclose to the petitioner that the tax receiver's deed to Mr. Brunner was void if the tax receiver (1) failed to distrain petitioner's personal property; or (2) to hold an auction or (3) had sold more property than was necessary to pay the tax bills? We just asked the question. Next question, even though such information was innocently withheld from your petitioner by counsel for respondent, Mr. Brunner, was the petitioner so mislead thereby that he was entitled to have the default judgment of October 22, 1956 set aside. See Fields v. Cornett, 254 Ky. 35, 42, 79 S. W. 2d 954; Kaze v. Compton (Ky.), 283 S. W. 2d 204, 207; Glock v. Carpenter, 184 F. Supp. 829, affirmed 286 F. 2d 431, Certiorari denied 81 S. Ct. 1651, 366 U. S. 930, 6 L. Ed. 2d 389. See 23 Am. Jur., Sec. 115, p. 898, etc. and Sec. 121, p. 910.

On March 11, 1957 petitioner filed another motion (Tr. of R., Case 1, pp. 34-35) and tendered an answer and counterclaim (Tr. of R., Case 1, pp. 36-42), which the court refused to file but let it be tendered and

made a part of the record) and to support his motion and tendered answer and counter claim filed on the same day his supplemental affidavit (Tr. of R., Case 1, pp. 48-54). Among other things in that supplemental affidavit, he said;

> "VI. * * * This affiant approached a representative or attorneys for the Plaintiff on several occasions and was unable to deal with them because they wanted more than the taxes, interest and penalties; and that on one occasion he offered to redeem—within the time allowed for redemption, as he now recalls—his property from tax sale by offering the Plaintiff's representatives $1,000.00 and to pay the difference or the balance in monthly payments, and that this offer was more, far more, than the amount of taxes, interest and penalties then due; that he was unable to raise the money to meet their demands, and that the amount of their demands increased as time went on, and that finally, sometime—he believes—in 1954 or 1955, he is not sure which, they demanded $7,000.00, far in excess of the amount of interest, penalties and costs, and they demanded it in cash, which was impossible for this defendant and affiant to raise, and that the Plaintiff, his Agents and Attorneys have by their exorbitant demands from 1951 on down to the present made it impossible for this affiant to raise the money to meet their demands. He says that the misconduct of the Plaintiff, his Attorneys and Agents, in demanding an exorbitant sum to redeem his property, has made it impossible for him to get up the money to pay it off.
>
> * * * * * * *

"VIII. Affiant further states that he has no recollection of being served with a summons in this action, but he does not deny that he may have and was served but did not understand or know what it was at the time, and that when he inquired around and found out what it was about he tried to employ several lawyers to represent him, but that each and every lawyer he requested to represent him requested and demanded a substantial cash retainer fee, which he was unable to raise due to the misconduct of the Plaintiff in depriving him of rents, etc., and he was unable to get one to represent him in this action until after a default judgment had gone and he had no pleading in the case. * * *"

All of the above affidavits and pleadings were before the Court of Appeals of Kentucky on the first appeal. However, the Court of Appeals of Kentucky, in Richardson v. Brunner, 327 S. W. 2d (Ky.) 572 (see Append. I, p. 57 of the petition), said that your petitioner had failed to explain his failure to defend and that there were no misrepresentations that mislead him and that the trial court did not abuse a sound discretion in so holding. Silence, when there is a duty to speak, a failure to disclose the true facts, is often a more vicious fraud than actual misrepresentation. We respectfully maintain that there was an abuse of a sound discretion.

In Richardson v. Brunner, *supra*, Append. I, p. 57, the Court of Appeals of Kentucky, continuing, said:

"(2) He says that he couldn't defend the action because of his inability to pay an attorney to

represent him. However, the record shows that he did procure an attorney shortly after the default judgment was taken. He does not undertake to say that he did not have the same resources before the default judgment as after. In fact, the record discloses that he owned property other than that involved in this action. The record also shows that, during the year in which this action was originally filed he was collecting rent. The record shows that he had from May until late October to make arrangements for counsel. There is sufficient evidence in the record upon which the court might determine that Richardson was able to employ counsel, and there is nothing in this motion to show that he tried to employ counsel."

In Case 1, Tr. of R., p. 11, your petitioner was served with a summons on May 24, 1956 and within two weeks thereafter on June 7, 1956 the court appointed a receiver to receive his rents, Tr. of R., Case 1, pp. 93-94. The receiver filed a report to the court on January 6, 1957, Tr. of R., Case 1, pp. 98-100. On January 28, 1957, Tr. of R., Case 1, p. 102, the rents were distributed but not to your petitioner, but to the respondent Mr. Brunner. Hence, the statement of the court that he was collecting rents is erroneous. The other property owned by him mentioned by the court, is the property involved in Case 2 and was at that time held by the Respondent Brunner under a quit-claim City Tax Receiver's deed.

Let me further quote from Petitioner's Supplemental Affidavit about the employment of an attorney:

"* * * He states that after the default judgment had gone against him, Mr. Stewart Miller agreed to represent him for a fee of $2,000.00 *if he could win it*, and then, shortly thereafter, Mr. Miller urged him to give a quit-claim deed to an undisclosed buyer for anything that he could get out of it, even as little as $10.00, and that he, Mr. Miller, would take $500.00; and when this affiant refused to comply with Mr. Miller's wishes, counsel and request, Mr. Miller voluntarily withdrew from the case and returned his file to this affiant.

"Affiant says that he was then very discouraged and despondent and that he could not raise any money, and he was finally sent to his present counsel, H. E. Rose and Robert Hubbard, who agreed to take his case on a strictly percentage basis. This affiant says that he did not neglect this case, but tried diligently to obtain counsel to represent him, but could not do so for reasons herein expressed." Tr. of R., Case 1, p. 53.

This statement in his affidavit clearly shows that he could not raise any money to pay an attorney, hence the statement of the Court of Appeals of Kentucky is misleading.

On March 24, 1959, Tr. of R., Case 1, pp. 103-105, Petitioner filed still another motion to set aside the default judgment of October 22, 1956 on two grounds: namely, (1) that said judgment was void because the complaint (see pp. 3-5 above), did not state a cause of action which clothed the court with jurisdiction to grant it, and (2) that KRS 91.540 upon which the complaint was allegedly based was and is in plain violation of the Fifth and Fourteenth Amendments of the

Constitution of the United States. In support of this motion, he filed his affidavit in which, among other things, he said:

> "When he had conversations with Mr. Brunner's attorney in the summer of 1955, Mr. Brunner's attorney did not inform him of his rights. Mr. Brunner's attorney did not tell him that the deeds were void ab initio. Mr. Brunner's attorney did not tell him that the Tax Receiver violated the statute in selling more real estate than was necessary. Mr. Brunner's attorney did not tell him that it was the Tax Receiver's duty to distrain and sell his personal property first. In short, Mr. Brunner's attorney did not inform him of any of his rights, but concealed all of his rights from him." Tr. of R., Case 1, p. 107.

On March 24, 1959 petitioner, see Tr. of R., Case 2, pp. 4-12, filed a complaint for a declaration of rights against the respondent, Mr. Brunner, to recover from Mr. Brunner the other property, on the ground that KRS 91.540 by which Mr. Brunner received a city tax deed, was unconstitutional and in plain and direct violation of the Fifth and Fourteenth Amendments of the Constitution of the United States.

The trial court dismissed his complaint. The Court of Appeals of Kentucky —see Append. III, pp. 63-66— held that KRS 91.540 was constitutional and met the requirements of due process of law, because, they said, that in Brunner v. Bell, *supra,* and other cases, they had held that the taxpayer might recover his property after it had been taken by showing that in the tax sale of his property, the provisions of the statute had not

been complied with. The utter futility of trying to recover his property—under the authority of Brunner v. Bell *supra*—is more than amply illustrated in Case 1 at the bar. For almost six long years, petitioner has been diligently, yes very, very diligently, trying to have the default judgment of October 22, 1956 (which is absolutely void, see pp. 1-6 above) by which his property was taken, set aside and to have his day in court, and to have a hearing on the merits. Case 1 at the bar is of itself most convincing, that a hearing, after property is taken, is not due process of law, either in letter or spirit.

A court of appeals of Kentucky has repeatedly held: (1) that default judgments are not favored; (2) that if timely motions are made presenting a valid defense, such default judgments shall be set aside; (3) that when the losing party is mislead by its adversary, a default judgment should be set aside; (4) that where vital material facts are known to one party and not disclosed to the other party, a deed should be cancelled; (5) that to clothe a court with authority to render a valid judgment, default or otherwise, a cause of action must be stated or else the judgment rendered thereon is absolutely void; (6) that a cause of action based upon the statute must plead the provisions of the statute, or else it is fatally defective, and any judgment rendered under it is absolutely void.

The Court of Appeals of Kentucky has erroneously denied your petitioner each and every remedy above mentioned, and finally, has committed their gravest error by holding that the possibility of recovering property after it has been taken, is due process of law.

IV.

KRS 91.540 VIOLATES THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AND THE STATE OF KENTUCKY IN THAT IT TAKES PRIVATE PROPERTY FOR PUBLIC PURPOSES WITHOUT JUST COMPENSATION.

On this point we most respectfully request this honorable court to reread pages 17-19 and pages 48-50 of the petition. Will this honorable court, Case 1, allow petitioner's property, worth approximately $25,000, to be taken (in reality confiscated) for approximately $1,200 taxes for public purposes in plain violation of the Fifth Amendment of the U. S. Constitution? In Case 2, petitioner's property is worth approximately $3,500 and respondent takes it for a song. Surely, this honorable court will not sanction such unjust confiscation of petitioner's property and the very, very unjust enrichment of respondent at petitioner's expense.

V.

ABUSE OF POWER TO COLLECT TAXES IS A MOST POTENT FACTOR IN THE DOWNFALL AND OVERTHROW OF CIVIL GOVERNMENT—ETERNAL, UNCHANGEABLE PRINCIPLES VIOLATED —DEFENSE.

1. Power to Tax—Power to Destroy.

In McCulloch v. State of Maryland, *et al.*, 17 U. S. 316, 4 Wheat 316, 4 L. Ed. 579, at p. 607, Chief Justice Marshall said:

"* * * that the power to tax involves the power to destroy."

The arbitrary power conferred on the Tax Receiver by KRS 91.540 is most certainly a power to destroy inalienable property rights.

I make no claim to being learned in law, especially constitutional law, or to history. Yet, I have some little knowledge of these subjects. It was my very happy, great privilege to study law under one of the greatest Chief Justices of his honorable court, namely, Chief Justice Harlan F. Stone. And, may I pause here, to pay a tribute to his memory. He was a man of deep, sympathetic understanding of human nature, a gentleman, and a scholar, a very able jurist, and, above all, a man of the highest honor and integrity. He was and still is an inspiration to me.

Now, I have studied history a little and am convinced that the abuse of the power to collect taxes, if not remedied, has been and is one of the most potent factors in the overthrow of civil government. This was true even before Solomon's time. Volumes could be written on this point alone. It was a very potent factor that brought about our own revolution. It was a most potent factor in the downfall of the French government and in provoking the French revolution—reign of terror—and the guillotine in 1789-1794. We most respectfully maintain that if this honorable court, by its silence, permits the opinion of the Court of Appeals of Kentucky in the case at bar to stand, there

is grave possibility of abuse of power in collection of taxes that may sooner or later overthrow our own government.

2. Eternal, Unchangeable Principles of Inalienable Rights Violated.

John Greenleaf Whittier wrote one of the sublimest poems ever written in any language, entitled "Eternity". Let me quote the first stanza:

> "BOUNDLESS Eternity! the winged sands
> That mark the silent lapse of flitting time
> Are not for thee; thine awful empire stands
> From age to age, unchangeable, sublime:
> Thy domes are spread where thought can never climb,
> In clouds and darkness, where vast pillars rest.
> I may not fathom thee: 't would seem a crime
> Thy being of its mystery to divest,
> Or boldly lift thine awful veil with hands unblest."

I believe every member of the court would enjoy reading it.

Now, I am scarcely one-millionth part of a speck on the brink of eternity; scarcely one-millionth part of a grain of sand on the seashores of time; scarcely one-millionth part of a drop of water in all the seas, oceans, lakes and rivers. But, we are fighting for the eternal principles of right against wrong, of justice against oppression. We are earnestly contending for the inalienable, inviolate right of a property owner, under both Federal and Kentucky constitutions, to a hearing

before, NOT AFTER, his property is taken or conveyed for a tax bill. This right, so often trampled under foot will remain, until the eternal living supreme Being of the Universe sees fit for time to be no more and man to cease inhabiting the earth.

Le me quote a few sentences from earlier opinions of the Court of Appeals of Kentucky:

From the opinion of the City of Louisville v. Cochran, 82 Ky. (John Rodman), 15, we quote some pertinent statements or principles:

> "It is important that we understand, here what is the meaning of 'due process of law', or 'the law of the land'.
>
> "This court said, in Varden v. Mount, Hines, Judge, 78th Kentucky, 89:
>
> "'The meaning of that provision has generally been construed to be a law that hears before condemning, and arrives at a judgment for the divestiture of the rights of property through what is ordinarily understood to be judicial process—the general rules that govern society in reference to the rights of property'." * * *
>
> "*It is now generally understood by citizens, as well as courts, that the Legislature has no power to interfere with title of the citizen to his property, or to interrupt him in its free enjoyment, much less to transfer it, against his will, to another, either by express enactment or destruction of the remedies for its defense and protection.*" * * *
>
> "And, while this summary remedy for levying, assessing, and collecting taxes has the plea of necessity and immemorial usage for its support,

every dictate of natural justice and the letter and spirit of the constitution require that the citizen shall be warned, and have an opportunity to be heard before he is condemned, or his money or property taken, and secure to him the right to have a judicial hearing upon the existence of an alleged power and the legality of its exercise whenever his constitutional rights are imperiled thereby." * * *

"For the direct destruction of individual rights by legislative declaration is no less unconstitutional than the enactment of remedies which lead to similar results. (Vanzant v. Waddell, 2 Gerger, 270.)

"*And the manner of the exercise of an otherwise just and clear authority may be as usurpatory as an arbitrary assumption and it is the most insidious method of unauthorized acquisition of power, whose slightest touch should be the instant for pause, and its first and every assertion the occasion for fearless resistance, and the ground of respectful, but determined disregard.*" * * *

". . . Thus, while summary process, based upon necessity and immemorial usage, is allowed, and its execution generally and properly confided to ministerial officers, the rights of the citizen are guarded by 'the law of the land" from invasion, in the name of this very summary process itself, and by the unregulated assertion and the unconstitutional assumption of power; * * *"

In Maguiar v. Henry, etc., 84 Ky. 1, the Court of Appeals of Kentucky said:

"The laws for the assessment and collection of taxes are necessarily summary in their character.

Title is divested by special statute; but it is strictissimi juris, and must be followed in all material respects. The taxpayer is entitled, by 'the law of the land', to be heard before he is condemned. * * * .

"The Constitution of the United States re-echoes this fundamental rule, so early established, by providing that no person shall be deprived of life, liberty, or property, 'without due process of law'; while our State Constitution says, 'nor can he be deprived of his life, liberty or property unless by the judgment of his peers, or the law of the land'." * * *

"When a litigant claims right under the act of an officer he should state the facts which show that the latter had a right to act. A tax deed results from the exercise of a statutory power; and if the necessary preliminary steps are not taken, the power is not created. . . ."

In the case of Board of Levee Com. v. Johnson, *et al.*, 178 Ky. 287, 119 S. W. 8, the Court, among other things, said:

"* * * We need only to say that the substance of them is that 'due process of law', and 'the law of the land' mean when applied to actions, proceedings or prosecutions pending in any court that no citizen shall be deprived of his life, or his liberty, or his property, without reasonable notice and reasonable opportunity to be heard according to the regular and established rules of practice and procedure before judgment is pronounced depriving him of either." * * *

The Court of Appeals of Kentucky in the case at bar, Case 2, Appendix III, p. 65, said that the above

cases had no application to the case at bar. We most respectfully maintain that the principles of law enunciated in ther apply to any statute that gives an executive officer the right to convey a taxpayer's property without giving him a chance to be heard, before his property is conveyed, on whether or not, in the sale of the property, the provisions of the statute respecting the sale have been complied with.

It is quite possible that this honorable court may consider the writer a fanatical dreamer or visionary. I may be a dreamer or a visionary, but I am not either crazy or a fanatic. I am a very, very real realistic person and I have a very real and abiding conviction that, it is not only quite possible, but very probable, that, if this honorable court, by its silence, approves and lets the opinion of the Court of Appeals of Kentucky, involved herein, stand to the effect, that where a taxpayer may possibly recover his property after it has been taken, by a statute which takes it without notice or a hearing, meets the requirements of due process of law, then said opinion of the Court of Appeals may be the opening wedge whereby due process of law is emaciated and destroyed and that part of our constitution will become a mere scrap of paper.

If this honorable court, by its silence, approves and affirms the judgment in these cases, to the effect that property may be taken for the collection of taxes for public (all taxes are, in our theory and system of government, for public purposes) purposes, without a hearing and without just compensation, then the Fifth

and Fourteenth Amendments of the Constitution of the United States is nullified and becomes a mere scrap of paper.

The German people were and still are a great people. They had, under the Weimer republic, a constitution which protected the rights of its citizens. Unfortunately, they let Hitler destroy their constitution while apparently working within it. There is no need for me to emphasize the appalling consequences. But, you say that this cannot happen in America. It can if statutes in plain violation of the fundamental rights guaranteed by our constitutions are not allowed to stand, as in the cases at bar. "Eternal vigilence is the price of liberty", said Daniel Webster.

In October, 1871, a cow kicked over a lantern in Chicago. A great city was almost completely destroyed by fire. In the summer of 1914 the Archduke of Austria was assassinated. It was the match, so to speak, that started World War I.

If this Honorable Court, by its silence, approves and confirms the Court of Appeals of Kentucky in the cases at bar, it is quite probable that such silence will be a spark that will consume and destroy the effectiveness of the Fifth and Fourteenth Amendments of the United States Constitution, as well as Kentucky's constitution.

3. Defense.

We have and are spending billions of dollars for defense. Wherein does our greatest defense lie? Does it lie so much in our vast armed forces or does it lie more in the character of our people themselves? Lincoln once said, in substance, that if our country was ever destroyed, it would not be by foes without, but suicide from within. It is the writer's firm conviction that among the surest defenses we have, is that of maintaining inviolate our inalienable constitutional rights, among which are: (1) the right to be heard before, not after, our property is taken, even for the collection of taxes, and (2) the right to have just compensation for our property when it is t ken for public purposes, for the collection of taxes.

For reasons hereinabove set forth, we most earnestly plead with this Honorable Court not only to grant this petition for a rehearing, but to grant petitioner's petition for a writ of certiorari.

Respectfully submitted,

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ROBERT HUBBARD,
Kentucky Home Life Building,
Louisville 2, Kentucky,
Counsel for Petitioner.

HECTOR E. ROSE,
Of Counsel.

CERTIFICATE OF GOOD FAITH, ETC.
Rule 58(2)

I, Robert Hubbard, Counsel for Petitioner, in all sincerity and good faith, state: (1) that this petition is not filed for delay; (2) that, although the other substantial ground hereinabove stated in paragraph II, pp. 7-10 was available, it has not previously been mentioned; (3) that, not out of any disrespect or disregard (I most truthfully and solemnly assure the Court) for the rules of this Court or of this Honorable Court, but, (a) out of a fine conviction that the court has erred in denying Petitioner's Petition, (b) out of firm conviction, not only for Petitioner but for all real property owners, that the ends of justice require that his petition be granted, (c) out of a fervent hope that even yet his petition may still be granted, I have in paragraphs I, pp. 1-6; III, pp. 11-23; IV, p. 24, and V., pp. 24-32, either summarized or enlarged arguments heretofore made. I am fully persuaded that this Honorable Court is composed of too great men to take offense, that it governs and controls its own rules.

Confidently hoping,

Respectfully submitted,

R. Hubbard

ROBERT HUBBARD,
Counsel for Petitioner.